

Supreme Court, U.S.
FILED
OCT 26 1979
HUGHES, JR., CLERK

In The
Supreme Court of the United States

October Term, 1979

No. 79-

ROSE SHUFFMAN, as Executrix of the
Estate of OSCAR SHUFFMAN, Deceased,

Petitioner,

-against-

HARTFORD TEXTILE CORPORATION, et al., etc.,

Respondents.

**MOTION FOR LEAVE TO FILE PETITION
FOR WRIT OF MANDAMUS AND PETITION
FOR A WRIT OF MANDAMUS**

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-against-

HARTFORD TEXTILE CORPORATION, OXFORD
CHEMICALS, INC., WELLINGTON PRINT WORKS,
INC., A. DANIEL FUSARO, CLERK OF THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT, EDWARD GUARDARO, STAFF
ATTORNEY TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT, IRVING
R. KAUFMAN, CHIEF JUDGE, AND WILFRED
FEINBERG, WALTER R. MANSFIELD, WILLIAM
HUGHES MULLIGAN, JAMES L. OAKES, WILLIAM
H. TIMBERS, MURRAY I. GURREIN, ELLSWORTH
A. VAN GRAAFEILAND, THOMAS J. MESKILL,
AMALYA KEARSE, JON O. NEWMAN, STERRY R.
WATERMAN AND JOE INGRAHAM, JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT,

Respondents.

MOTION FOR LEAVE TO FILE PETITION
FOR WRIT OF MANDAMUS

Petitioner respectfully moves this Court for leave to file the petition, hereto annexed, for a writ of mandamus, pursuant to the provisions of Title 28 United States Code, Section 1651, directed to the United States Court of Appeals for the Second Circuit, and the Honorable Irving R. Kaufman, Wilfred Feinberg, Walter R. Mansfield, William Hughes Mulligan, James L. Oakes, William H. Timbers, Murray I. Gurfein, Ellsworth A. Van Graafeiland, Thomas J. Meskill, Amalya Kearse, Jon O. Newman, Sterry R. Waterman and Joe Ingraham¹, Judges of the United States Court of Appeals for the Second Circuit, and Hartford Textile Corp., Oxford Chemicals, Inc., Wellington Print Works, Inc., A Daniel Fusaro, Clerk of the United States Court of Appeals for the Second Circuit, Edward Guardaro, Staff Attorney to the United States Court of Appeals for the Second Circuit.

Dated, New York, New York this 22nd day of October 1979.

Yours, etc.

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(212) 755-0006

¹) Fifth Circuit Judge sitting in the Second Circuit by Designation.

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WATERMAN, AND JOE INGRAHAM, JUDGES OF THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT,

Respondents.

PETITION FOR A WRIT OF MANDAMUS

To the Honorable Warren E. Burger,
Chief Justice of the United States,
and the Associate Justices of the
Supreme Court of the United States:

ROSE SHUFFMAN, as Executrix of the
Estate of OSCAR SHUFFMAN, Deceased, the
above-named petitioner, respectfully shows:

I. Opinions Below

The United States Court of Appeals for
the Second Circuit delivered an oral opinion
from the Bench on May 9, 1978, denying
Petitioner's Motion to Mandate Jurisdiction
Back to the District Court. The order deny-
ing the motion without opinion, was entered
in the Court of Appeals on May 9, 1978 and
is reprinted at page 1a of the Appendix
hereto.

One week later, on May 16, 1978, with-
out explanation, the Staff Attorney to the
Court of Appeals, Edward Guardaro, materially
altered the original order which was then
termed a "CORRECTED" Order and also dated
May 9, 1978. This back-dated, altered Order
denied the motion "without prejudice to apply
to [District] Judge Brieant for whatever
relief is appropriate," and was then docketed
in the Court of Appeals bearing the original
May 9, 1978 hearing date. The "CORRECTED"
Order is reprinted at page 3a of the Appendix
hereto.

The "CORRECTED" Order did not change the
decretal paragraph which denied the oral
application to stay the proceedings in the
Court of Appeals, nor did the "CORRECTED"

Order provide the District Court with the
necessary jurisdiction to grant the
application for "appropriate relief."

On May 16, 1978, before the alteration
of the original order, Petitioner filed a
Motion to Reargue the Court of Appeals
original order. Petitioner later submitted
a Reply Affidavit in support of the Motion
to Reargue which recited the fact that a
"CORRECTED" Order had been issued during
the pendency of the Motion to Reargue and
requested that the Motion be read as encom-
passing both Orders.

In the Affidavit in Opposition to the
Motion to Reargue filed in the Court of
Appeals, Respondent's counsel repeated the
deliberate misrepresentations made during
the argument on May 9, 1978, that the Dis-
trict Court's April 17, 1978 Order vacating
the determination to grant reargument as
improvidently granted was based upon a
review of the merits. The perjurious part
of the Opposing Affidavit reads as follows:

"Appellant continues to cloud the
issues on appeal, with repetitious
motions and appeals which are vex-
atious and wholly without merit.
Appellant's instant motion is
apparently motivated by a belief
that District Judge Breiant,
twice having reviewed the record
in the bankruptcy court, will on
a third review, change his decision.
Both parties will have the oppor-
tunity to address the merits on
appeal, argument of which is
tentatively scheduled before this
Court for the week of June 19, 1978.

If assuming, arguendo, that any errors have been committed by either the bankruptcy court or the district court, this Court will assuredly correct such errors in its decision on the appeal. No legitimate purpose will be served by granting the instant motion other than to cause additional delays at substantial inconvenience to the Court and time and expense prejudicial to debtors-appellees."

The Motion to Reargue in the Court of Appeals was denied in June, 1978, although announcement of the decision was withheld for over three months. On September 13, 1978, an Order was finally issued and docketed denying the Motion to Rehear and Reargue. A copy of the Order denying the Motion is reprinted at page 5a of the Appendix hereto.

At a hearing on June 8, 1978, the District Court Judge, after reviewing the "CORRECTED" Order to determine whether or not jurisdiction existed to grant the application for "appropriate relief", termed the altered and back-dated "CORRECTED" Order "incomprehensible." The District Court then entered an Order denying the application, which reads in pertinent part:

"It now appears, the Court of Appeals having specifically denied appellant's oral application to stay proceedings in that Court, that a plenary appeal from the order of the district court of February 22,

1978 will soon be heard by a panel of the Court of Appeals. Indeed, a briefing schedule has already been adopted in that Court.

Under the circumstances, it is not clear what relief, if any, could be regarded as "appropriate," nor is it clear what was intended by that portion of the order of the Court of Appeals docketed May 9, 1978 which denied the motion to remand "without prejudice to apply to [the district court] for whatever relief is appropriate."

* * *

There also seems to be no useful purpose which would be served by taking any further steps in the district court at this time. The Court of Appeals has before it all of the proceedings which took place before Bankruptcy Judge Babitt. Counsel for the debtor has asked this Court: "in the interests of justice and in the interests of judicial economy and in the interests of the parties, this matter is now in the Court of Appeals and let the Court of Appeals proceed with the disposition of the appeal." This requested procedure does appear appropriate.

* * *

In all other respects the relief requested by Shuffman's motion, docketed in this Court on May 19,

1978, is denied in the exercise of discretion as being unnecessary in view of the imminent hearing on the appeal to the Court of Appeals, and is also denied for want of power. See, Weiss v. Hunna, supra."

A copy of the District Court Order, dated June 9, 1978, was docketed in the United States District Court for the Southern District of New York on June 12, 1978, and is reprinted at page 6a of the Appendix herein. Obviously, the Court of Appeals was aware of the "interests of justice", judicial economy, and the imminent argument in the Court of Appeals when the "CORRECTED" Order allowing Petitioner to apply back to the District Court was entered.

On or about June 23, 1978, Petitioner filed a Petition for a Writ of Certiorari in the United States Supreme Court to review the altered, back-dated and "incomprehensible" "CORRECTED" Order.

On October 2, 1978, the United States Supreme Court refused to review the phony "CORRECTED" Order of the Court of Appeals and entered an Order denying the Petition for a Writ of Certiorari in case Docket No. 77-1812.

II. Jurisdictional Statement

Jurisdiction of the Supreme Court of the United States is invoked under Section 1651 of Title 28 of the United States Code. The relief sought seeks to have the tape recording of the May 9, 1978 hearing on the Motion to Remand in the Court of Appeals transcribed to determine if the "CORRECTED" Order is a true Order. The relief is not available in any other Court for the reasons that the Petition for a Writ of Mandamus seeks to have this Court exercise its supervisory powers under Rule 19 of the Rules of the Supreme Court of the United States to determine whether the "CORRECTED" Order reviewed by this Court in case Docket No. 77-1812 was a true Order, or whether a fraud has been perpetrated on the Supreme Court by the Court of Appeals for the Second Circuit based upon the lower Court's allowing a forged, back-dated Order to stand for Supreme Court review.

The principals involved in perpetrating the fraud upon the Supreme Court are the Clerk, Staff Attorney and various Judges of the Court of Appeals for the Second Circuit. The Judges have refused for over one year to rule upon and/or grant the application of petitioner herein seeking to have the Court of Appeals's tape recording of the proceedings held on May 9, 1978 transcribed in violation of Second Circuit Rule 0.23, which transcription will prove or disprove that a false order has been allowed to stand for Supreme Court review.

The Supreme Court of the United States is the only Court with the power necessary to order the Judges of the Court of Appeals

to explain why a false document was allowed to stand for Supreme Court review; to order the Court of Appeals to act on Petitioner's year-old Application and to state why they have perpetrated a fraud upon the Supreme Court and upon the Petitioner herein.

III. Questions Presented

1. May the United States Court of Appeals for the Second Circuit deny Petitioner access to the record of an opinion issued from the Bench in a public hearing in violation of Second Circuit Rule 0.23?
- ✓ 2. Should the Clerk of the United States Court of Appeals for the Second Circuit be directed to transfer the tape recording of the proceedings held in the United States Court of Appeals for the Second Circuit on May 9, 1978 to the United States Supreme Court so that the tape may be transcribed by experts to determine whether the altered and back-dated "CORRECTED" Order is a forgery and false Order?
- ✓ 3. Was the "CORRECTED" Order of the United States Court of Appeals for the Second Circuit reviewed by this Court in Petition for a Writ of Certiorari, Docket No. 77-1812, a true order, or a forged, back-dated document?
4. Did the three-judge panel of the United States Court of Appeals for the Second Circuit acquiesce in and/or perpetrate a fraud upon the United States Supreme Court by allowing a knowingly false, forged and back-dated "CORRECTED" Order to stand for Supreme Court review?
- ✓ 5. Should the order denying the Petition for a Writ of Certiorari in Docket No. 77-1812 be vacated, and should reconsideration be ordered by the Court sua sponte based upon the True Order?

6. Has Petitioner been denied "due process" of law by the refusal of the United States Court of Appeals for the Second Circuit to obey the Court's own Rule and to rule upon her Motion to allow transcription of the tape of the May 9, 1978 proceedings for over one year?

✓ 7. Has Petitioner been denied "due process" by the refusal of the United States Court of Appeals for the Second Circuit to grant the Motion to Allow Transcription of the Proceedings Held on May 9, 1978?

8. Should the United States Supreme Court exercise its supervisory powers to determine whether the Petitioner and the Supreme Court have been defrauded as the result of a conspiracy to obstruct justice perpetrated by the Judges of the United States Court of Appeals for the Second Circuit?

IV. Constitutional Provisions and Statutes Involved

A. Rule 0.23 of the Rules of the United States Court of Appeals for the Second Circuit.

Rule 0.23. Dispositions in Open Court or by Summary Order.

The demands of an expanding caseload require the court to be ever conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made in open court or by summary order.

Where a decision is rendered from the bench the court may deliver a brief oral statement, the record of which is available to counsel upon request and payment of transcription charges. Where disposition is by summary order, the court may append a brief written statement to that order. Since these statements do not constitute formal opinions of the court and are unreported and not uniformly available to all parties, they shall not be cited or otherwise used in unrelated cases before this or any court.

(Amended June 10, 1977)

B. Title 28, United States Code, § 1651.
§ 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. As amended May 24, 1949, c. 139, § 90, 63 Stat. 102.

C. Article III, United States Constitution

Article III. Judicial Department.

Section. 1. Judicial power; courts; judges. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. Jurisdiction. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States,

and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

V. Statement of the Case

A. Proceedings in the District Court.

On March 28, 1978, District Charles L. Brieant entertained oral argument on Petitioner's Motion to Rehear and Reargue the Memorandum and Order of the District Court dated February 22, 1978 affirming upon appeal the Order and Amended Order of the United States Bankruptcy Court.

During the argument, the Court was advised that a Notice of Appeal to the United States Court of Appeals had been filed in the following exchange:

"MR. ZIRINSKY:
Mr. Shuffman has filed a
Notice of Appeal. I suggest
that we just get on with it.

THE COURT: Well, I will give
it another look."

At the close of argument, the District Judge marked the motion fully submitted and decision reserved. Although not specifically stated, the Honorable Charles L. Brieant thought he had granted reargument. He entered no formal Order to that effect.

Petitioner's counsel then sought advice from the District Court as to the exact status of the motion to rehear and reargue and the meaning of take "another look", because on March 23, 1978, counsel had filed a Notice of Appeal, divesting the District Court of jurisdiction. If the Court was inclined to grant the Motion, counsel intended to move in the Court of

Appeals for a remand so that the District Court could properly reach and rule on the merits of the Motion to Reargue.

The District Judge, apparently under the mistaken belief that the Appeal was taken after the determination to grant reargument was made, entered an Order vacating, as improvidently granted, the determination to hear reargument, and denied the Estate's motion without prejudice to such action as the parties deemed appropriate upon appeal. The Order, dated April 17, 1978, reads as follows:

Based upon two letters to the Court filed herein, dated respectively April 10, 1978 and April 13, 1978, the transcript of proceedings of March 28, 1978 and all prior papers and proceedings herein, it appears that the Court's decision to hear reargument of its Memorandum Decision and Order dated February 22, 1978 was improvident. Such reargument was heard on March 28, 1978 and decision reserved. Since that time the movant has appealed to the Court of Appeals for the Second Circuit.

The Court vacates, as improvidently granted, its determination to hear reargument, and denies the motion without prejudice to such proceedings on appeal as the parties may deem appropriate.

So Ordered.

Upon receipt of the District Court's Order which exhibited the Court's clear determination to grant reargument which determination was being vacated on the erroneous ground that the Notice of Appeal had been filed after the argument, Petitioner's counsel filed a motion in the Court of Appeals for the Second Circuit seeking to have jurisdiction mandated back to the District Court so that it could rule on the Motion to Rehear and Reargue. Counsel also filed an additional Notice of Appeal to the Court of Appeals from the Order vacating, as improvidently granted, the determination to grant reargument, based upon the belief that the Court lacked jurisdiction to enter the Order vacating its determination once the Notice of Appeal had been filed.

B. Proceedings in the Court of Appeals.

On May 9, 1978, argument on Petitioner's Motion for Order Mandating Jurisdiction Back to the District Court was heard in the Court of Appeals for the Second Circuit before Judges Walter R. Mansfield, Sterry R. Waterman and Joe Ingraham.² The only record of the proceedings was the tape recording on the argument and decision made by the Court of Appeals.

In an opinion from the bench, the Court of Appeals at first indicated that it would deny the motion without prejudice to reapply to the District Court. However, the Court then reversed its position and simply denied

². Fifth Circuit Judge sitting by designation.

the motion when it was advised by Petitioner's counsel that by recognizing the District Court's April 17, 1978 Order as validly entered after the Notice of Appeal had been filed, the Court was apparently over-ruling the precedent established in Lloyd v. Lawrence, 60 F.R.D. 116, (S.D. - Tex., 1973).

The Lloyd decision, cited to Petitioner's counsel by the District Court Clerk, had previously been circulated by the Administrative Director of United States Courts to District Court Clerks as outlining the procedure to be followed in remand situations once a Notice of Appeal to a Court of Appeals had been filed.

On May 9, 1978, after the argument, an Order was docketed in the United States Court of Appeals reflecting the Court's determination to simply deny the motion.

C. Proceedings at the Pre-Argument Conference in the Court of Appeals.

On May 16, 1978, immediately prior to a Pre-argument conference on Petitioner's appeal from the District Court's April 17, 1978 Order with Staff Counsel to the Court of Appeals under the so-called Civil Appeals Management Program, Petitioner's counsel filed a Motion to Rehear and Reargue the May 9, 1978 Order denying remand.

During the conference Petitioner explained that the Appeal of the District Court's April 17, 1978 Order was based upon the belief that the Court lacked jurisdiction to vacate the determination once the Notice of Appeal had been filed. Petitioner's

counsel was also on the belief that the appeal should be treated as a Motion to Remand. W's v. Hunna, 312 F.2d 711 (2nd Cir., 1963), cert denied 374 U.S. 583, 83 S.Ct. 1920, 10.L.Ed.2d 1073 (1963), and Lloyd, supra.

Noting the similarity between the motion which was denied on May 9, 1978, and the relief sought by the new appeal, and based upon Respondent Hartford's counsel's representation that Petitioner's counsel was informed by the Court that if he wished he could move once again in the District Court despite the denial, Staff Counsel Nathaniel Fensterstock requisitioned the Court's tape recording of the May 9, 1978 argument in an effort to determine exactly what transpired and why the motion had been denied.

The tape was audible as far as counsel's argument was concerned, but appeared garbled and inaudible when it came to the voices of the Judges. Staff counsel indicated at the close of the conference that he would check into the reasons for the denial of the motion.

The next day, May 17, 1978 Petitioner's counsel received in the mail a "CORRECTED" Order back-dated to May 9, 1978, which Order was changed in that added to the original Motion to Remand were the words ". . . [denied] without prejudice to apply to Judge Brieant for whatever relief is appropriate" (underscoring provided).

Petitioner's counsel proceeded to file a Reply Affidavit to the Motion to Rehear and Reargue which noted the change in the

original Order from denied to the "CORRECTED" Order's denied "without prejudice", etc.

D. Proceedings, in the District Court under the "CORRECTED" Order.

On June 8, 1978, a hearing was held in the District Court on Petitioner's Motion to Rehear and Reargue made pursuant to the "CORRECTED" Order. The district Court, upon a review of the "CORRECTED" Order to determine its jurisdiction to grant the motion in view of the Court of Appeal's refusal to stay the argument on the merits in the Court of Appeals scheduled for June 19, 1978, termed the "CORRECTED" Order "incomprehensible".

Upon being informed by Petitioner's counsel that Respondent's counsel had misrepresented to the Court of Appeals that the April 17, 1978 Order vacating the determination to grant reargument was based upon a consideration of the merits, the following exchange occurred:

MR. ZIRINSKY: The question I would present to your Honor for purposes of clarification, inasmuch as there is a strong likelihood we will be arguing this matter before the Court of Appeals next month --

THE COURT: You see, I am puzzled as to why, when you had that motion up there, you just didn't consent to a remand. This is an incomprehensible order to me, this May 9 order. Perhaps when I read this Weiss v. Hunna case, which I have been offered, which he says he

will send to me, I may be able to understand it. It may be my ignorance and not his that is the problem here. You see?

MR. ZIRINSKY: Assuming this Court does have jurisdiction, the point is the decision below by Judge Babitt has been affirmed, a prior motion for reargument was heard by the Court, and the Court entered a second decision denying the motion, or vacating the order granting the motion as having been improvidently granted.

THE COURT: In view of the pending appeal. I never reached the merits of the reargument motion. You see, any lawyer would know you can't be doing both at once. You can't be appealing and rearguing at the same time.

MR. ZIRINSKY: There is authority contra.

* * *

MR. ZIRINSKY: I have a further question to put, if the Court will indulge me, please.

If your Honor is going to take this under advisement, we may find ourselves in the position where the Court of Appeals has ruled.

THE COURT: Well, if the Court of Appeals rules, send me a copy. I don't get the point that you are making.

MR. ZIRINSKY: I am not sure exactly where we stand in the Court of Appeals. It is confusing.

THE COURT: Address yourself to the Court of Appeals and ask them, if you have a problem understanding the scope of the May 9th order. It is their order, not mine.

MR. ZIRINSKY: Am I correct in understanding that this Court has now granted the motion for reargument and has taken it under advisement?

THE COURT: I have done nothing today except to hear you people and reserve decision, because it is not clear to me what I have power to do under that May 9th order.

MR. ZIRINSKY: Has the motion for reargument been granted, your Honor, or you don't know?

THE COURT: I don't know. I don't know if I have the power to grant the motion for reargument.

MR. ZIRINSKY: Assuming you had the power.

THE COURT: Don't assume. Don't make assumptions. I don't give academic opinions. You have to share

responsibility with Mr. Shuffman for this procedural dilemma that you got yourself into.

MR. ZIRINSKY: I don't believe so, your Honor.

THE COURT: I do.

MR. ZIRINSKY: We have merely responded to motions. We have not made motions.

THE COURT: It would have been very simple for you to get up in the Court of Appeals and say, "I consent". At least you would know what court you are in. Now you don't know where you are.

MR. ZIRINSKY: The Court of Appeals told Mr. Shuffman that he was certainly at liberty to withdraw his appeal and move before this court, if he so desired.

THE COURT: Then, if this Court were to deny reargument, he would be left with no remedy anywhere, wouldn't he?

The next day, the District Court entered a Memorandum and Order reflecting the Court's bewilderment created by the "incomprehensible" "CORRECTED" Order. The Order reads in pertinent part as follows:

It now appears, the Court of Appeals having specifically denied appellant's oral application to stay proceedings in that Court, that a plenary appeal

from the order of the district court of February 22, 1978 will soon be heard by a panel of the Court of Appeals. Indeed, a briefing schedule has already been adopted in that Court.

Under the circumstances, it is not clear what relief, if any, could be regarded as "appropriate," nor is it clear what was intended by that portion of the order of the Court of Appeals docketed May 9, 1978, which denied the motion to remand 'without prejudice to apply to [the district court] for whatever relief is appropriate.'

Cases cited by appellant as authority for further proceedings at this time in this Court do not stand for the propositions urged. Specifically, appellant relies upon Weiss v. Hunna, 312 F.2d 711 (2nd Cir.), cert. denied 374 D.853 (1963). We read that case to hold that once a litigant has filed a notice of appeal the district court is divested of jurisdiction to grant or deny relief under either Rule 59 or Rule 60(b), F.R. Civ. P., except with the express permission of the Court of Appeals. The order docketed in the Court of Appeals dated May 9, 1978 does not seem to grant such express authority to the district court.

There also seems to be no useful purpose which would be served by taking any further steps in the district court at this time. The Court of Appeals has before in all of the

proceedings which took place before Bankruptcy Judge Babitt. Counsel for the debtor has asked this Court: "in the interests of justice and in the interests of judicial economy and in the interests of the parties, this matter is now in the Court of Appeals and let the Court of Appeals proceed with the disposition of the appeal." This requested procedure does appear appropriate.

* * *

In all other respects the relief requested by Shuffman's motion, docketed in this Court on May 19, 1978, is denied in the exercise of discretion as being unnecessary in view of the imminent hearing on the appeal to the Court of Appeals, and is also denied for want of power. See, Weiss v. Hunna, supra.

The Court of Appeals certainly was aware of the imminent hearing on the appeal on the merits from the District Court's February 22, 1978 Memorandum and Order prior to someone altering and back-dating the original order denying the motion and issuing the "incomprehensible" "CORRECTED" Order.

D. Proceedings in the Supreme Court.

On or about June 23, 1978 while the Motion to Rehear the May 9, 1978 Order or "CORRECTED" Order was ostensibly pending in the Court of Appeals, Petitioner filed a Petition for a Writ of Certiorari to

review the "CORRECTED" Order. The Petition was denied by order of the Supreme Court dated October 2, 1978, in case Docket No. 77-1812.

While Petitioner suspected that something was amiss in the Court of Appeals, it was not until the events of the latter half of 1978 and thereafter that it became crystal clear that the "CORRECTED" Order was a forgery, and that a fraud had been perpetrated upon the United States Supreme Court and the Petitioner by the Judges of the Court of Appeals for the Second Circuit named as Respondents herein, the Clerk of the Court, A. Daniel Fusaro and Staff Attorney Edward Guadaro.

E. Other Irregularities in the Court of Appeals.

During the months of June, July and August 1978, Petitioner's counsel filed approximately four additional motions in the Court of Appeals, each one seeking relief intended to secure an honest adjudication of the cause. One motion sought to strike Respondent Hartford's Supplemental Appendix, filed pursuant to Court Order, but which contained material not properly part of the Record Upon Appeal. Another sought the appointment of an independent Special Prosecutor to investigate the actions of the Bankruptcy Judge, already the subject of an expose in a major newspaper concerning his actions in another case, and the United States Attorney and various members of the U.S. Department of Justice, who found nothing improper in the head of the U. S. Attorney's Frauds Unit being made a partner in the law firm representing Respondent Hartford, despite the pendency of at least two major fraud investigations involving the firm and

the Bankruptcy Judge.

Petitioner sought the appointment of a Special Prosecutor immediately after the District Court Bankruptcy Committee had issued its report clearing the Judge of wrongdoing in response to the newspaper's charges, although the Committee did find that the Judge had utilized poor judgment. Two months prior to the newspaper expose, Petitioner's counsel had filed a Compliant against the Bankruptcy Judge with the Chief Judge of the District Court. The Chief Judge, when asked to comment on the newspaper's allegations, was quoted as saying that he was unaware of any problem involving the Bankruptcy Judge.

The Chief Judge blamed the U. S. Attorney for not bringing to his attention the ongoing F.B.I. investigation of the case reported in the newspaper. Apparently, the U. S. Attorney had also failed to advise the Chief Judge of the two Prosecution files that had been opened on the Bankruptcy Judge. However, both men were aware of Petitioner's complaints.

Petitioner's counsel was repeatedly informed by the Clerk's Office of the Court of Appeals starting in June, that no decisions had been reached on the merits on any of the motions. Then, on August 11, 1978, and again on August 15, 1978, counsel was requested to file 12-15 additional copies of all papers filed in the Court of Appeals so that the Court could determine the request for an en banc consideration of the motions prior to their being considered substantively. Failure to file the additional copies, counsel was informed, would result in a hearing on August 29, 1978 before a three Judge Court of Appeals panel to decide one

of the pending motions on the merits. If counsel complied, the August 29, 1978 hearing was to be adjourned to a later date.

Counsel complied with the August 11, 1978 request on August 11, 1978. However, shortly after the August 15, 1978 request for over three thousand additional pages of documents, counsel received a call from a docket clerk to advise him that an order had just been entered denying the motion for which copies had been requested and delivered.

Counsel sought clarification from the Clerk who had made the request as to why an Order had been entered substantively deciding the Motion which had tentatively been scheduled for a hearing on August 29, 1978, especially since counsel had complied with the additional copy requests. The Deputy Clerk advised him that the Order was being treated as a nullity, and was then crossed off the Court's Docket.

Petitioner's counsel sought written clarification of the action vacating the Order, and further requested a statement in writing regarding the second request for over three thousand additional copies. On August 17, 1978, the Deputy Clerk sent a letter confirming the telephone conversation but which made no mention of its content or the action vacating the Order. The letter did, however, confirm the copy request. Counsel later discovered that a blind copy of the letter had been sent to Chief Judge Irving R. Kaufman.

Petitioner's counsel repeated his request for written confirmation that the Order which had been docketed on August 15,

1978 had in fact been vacated and was being treated as a nullity. However, while waiting confirmation, counsel complied with the additional request for over three thousand copies.

On August 27, 1978, counsel received a letter from the Deputy Clerk in response to his request and was assured that none of the motions had been decided substantively. Counsel was further advised that the Court would first resolve the question of en banc considerations of the motions, before rescheduling hearings on the merits of the motions. A copy of the letter was sent to the Chief Judge.

However, approximately six days prior to the letter, while counsel was delivering the second batch of copies, he was advised by sources within the Court of Appeals who were fed up with the wrongdoing and chicancery, that all of the motions had substantively been denied. However, no one was able at that time to document the fact that all the motions had been denied.

On September 11, 1978, and September 13, 1978, without the hearings ever being rescheduled, orders were entered substantively denying all but the Motion For Order Directing the President to Appoint a Special Prosecutor. The file reflects that one of the Orders was really the August 15, 1978 Order which had been allegedly vacated, with the date whited-out and a new date affixed. No explanation was tendered as to why no hearings had been scheduled or allowed despite the written confirmation.

More importantly, also on September 13, 1978, Petitioner's counsel was furnished with copies of the decisions substantively denying all five motions, including the Motion for appointment of a Special Prosecutor. Counsel also obtained copies of four Memoranda circulated to all the en banc Judges, as well as Senior Judge Waterman and Fifth Circuit Senior Judge Ingraham, by Chief Judge Irving R. Kaufman on August 21, 1978, reciting that all Petitioner's motions, save the motion seeking the appointment of a special prosecutor, were denied. (Judges Mansfield, Waterman and Ingraham denied the motion for a Special Prosecutor in July, 1978.) The dates of the decisions, as well as the text of the Chief Judge's Memoranda, indicated that one of the motions had been denied in early June, two in early July and one in early August.

At this point, given the tape gaps in the May 9, 1978 tape discovered at the May 16, 1978 pre-Argument Conference, the backdated and falsified "CORRECTED" Order and the copies of the Opinions which had been withheld for months despite assurances that no decisions had been reached, during which time the Court of Appeals was considering the appeal of a contempt citation issued to the Attorney General, counsel became convinced that a cover up of the fix in the Bankruptcy Court had reached as high the Court of Appeals.

Petitioner's counsel's big break in exposing the cover up came two days later on Friday September 15, 1978, when he picked up a copy of a letter which was to be mailed to him that day advising him that a hearing on the Motion for Order Directing

the President to Appoint a Special Prosecutor was scheduled for Tuesday, September 19, 1978, to be heard before a panel consisting of Court of Appeals Judges William H. Timbers, Ellsworth A. Van Graafeiland and Leonard P. Moore.

On Monday, September 18, 1978, counsel obtained certified copies of the decision denying the Special Prosecutor motion scheduled for a hearing the next day from Chief Clerk A. Daniel Fusaro. Copies were mailed on that day to various news media outside the metropolitan New York area. On Tuesday, September 19, 1978, at 10:15 a.m., timed to coincide with oral argument on the motion, counsel had four messengers deliver copies of a Supplemental Affidavit in support of the motion, containing the decisions as exhibits, to New York based media.

During the argument, counsel presented copies of the Supplemental Affidavit with exhibits to the three-judge panel, who were dumbfounded and stupefied. At the close of argument, decision was "reserved".

Three hours later, the Docket Clerk called to advise that the motion had been denied. The damage, however, was already done. The "charade" hearing, staged to make things look good on a Motion which had already been denied, although not resulting in the requested relief, had back-fired.

Argument on the appeal on the merits was then scheduled for October 19, 1978 before Judges Timbers, Van Graafeiland and J. Joseph Smith. On October 16, 1978, counsel filed a Motion to Allow Transcription of the Proceedings held May 9, 1978.

Counsel argued that the transcription would show that the "CORRECTED" Order back-dated to May 9, 1978 was a phony. By order of Judge Timbers on October 16, 1978, the Motion was referred to the panel of May 9, 1978, consisting of Judges Mansfield, Ingraham and Waterman. To this day, they have not ruled on the Motion.

On December 6, 1978, the Court of Appeals rendered a Per Curiam Opinion affirming the lower Court's order. The Opinion directly contradicted the order and amended order to the Bankruptcy Court which it was actually intended to affirm. The Petition for rehearing was later denied.

F. Return to the Bankruptcy Court.

In the interim, on October 25, 1978, Petitioner moved in the Bankruptcy Court for an order of contempt against Respondent Hartford's Counsel. The Court, realizing that documents had to have been falsified, directed that a Complaint be filed with the U.S. Attorney under 18 U.S.C. §3057 charging Respondent Hartford's counsel with perjury, conspiracy and other acts of bankruptcy fraud.

In mid-November, 1978, after the Complaint was filed with the U. S. Attorney, Petitioner's counsel obtained documentation from a representative of the minority shareholders, who are the brothers and sister of Respondent Hartford's President, showing that the Petitions, Schedules and Statements filed by Respondents and prepared by their counsel were false. At a hearing held in the Bankruptcy Court on December 8, 1978, seeking to revoke the fee awarded to Res-

pondent Hartford's counsel, the Court stated on the Record that it had already advised the U.S. Attorney's Office that Respondents and their counsel had lied. The Court, however, refused to revoke the fee.

G. Staff Counsel Denies He Played Any Tapes at the May 16, 1978 pre-Argument Conference.

On January 28, 1979, a Manhattan weekly newspaper, OUR TOWN, started the first of a continuing eight part series reporting upon the obvious fix, cover up and other bizarre happenings in In re Hartford Textiles Corporation, et al. In one of those articles, Staff Counsel Nathaniel Fensterstock is reported as denying ever having played any tapes at the May 16, 1978 pre-Argument Conference.

However, at the June 9, 1978 hearing before the District Court held under the auspices of the "CORRECTED" Order, and at which the Court termed the "CORRECTED" Order "incomprehensible", the Court was advised that Staff Counsel had played the tapes of the May 9, 1978 argument at the May 16, 1978 pre-Argument Conference. The pertinent part of the transcript reads as follows:

THE COURT: I think I had better get the transcript of the proceedings which took place in the Court of Appeals.

MR. ZIRINSKY: There is none, your Honor.

MR. SHUFFMAN: Your Honor, there is a transcript.

THE COURT: Do you have it with you?

MR. SHUFFMAN: No sir. There is a transcript. The Court of Appeals, as I believe you are aware, makes a taped recording of those proceedings. That tape was played for us at this pre-argument conference at the Court of Appeals. Unfortunately the voices of the judges of the Court of Appeals are garbled. We are going to make a motion to have that tape sent to experts, because we are not quite sure that that corrected order is a corrected order --".

H. The Second Circuit's Explanations for the Altering and Back-Dating of the "Corrected" Order.

When counsel first pressed for an explanation as to why the original May 9, 1978 Order had been altered, he was informed that a "clerical" error was at fault. Efforts to confirm the explanation were fruitless, as the clerk who had allegedly made the error had left the Court's employ shortly thereafter.

Answers to such other questions, such as why the "CORRECTED" Order had been back-dated, or why a blind copy of the letter confirming the request for additional copies had been sent to the Chief Judge, were declined. Nor has any explanation ever been tendered as to why the "charade" hearing was staged September 19, 1978 on the motion for a special prosecutor, when the motion had been denied in early July, 1978, or why

the original panel which denied the Motion did not come forward to halt the "charade".

Several months ago, however, after repeated demands, counsel was provided with a bizarre explanation as to why the original May 9, 1978 Order had been altered. According to Staff Counsel Guardaro, whose signature appears on both Orders, he was informed that both sides' counsel had agreed at the May 16, 1978 pre-Argument conference to a change in the Order which was allegedly "erroneous". According to Staff Counsel he was then directed to and did "CORRECT" the Order.

No such agreement was ever discussed, let alone made. Nor are counsel for the Petitioner or counsel for Respondent Hartford Supreme Court Justices, who can order the Order vacated, modified or reversed.

VI. Argument

There is a very serious question as to whether or not the Court of Appeals for the Second Circuit has engaged in a deliberate conspiracy to obstruct justice and cover up of a fix in the Bankruptcy Court to protect Respondent Hartford and its counsel.

There can be no denying that corruption in the Federal Courts which prevents the honest administration of justice and subverts the Constitution is the most important issue which the Supreme Court can ever have presented for review. It is very simple for this Court to order the Clerk of the Court of Appeals to deliver the tape of the May 9, 1978 argument to the Supreme Court so that a transcription may be had which will clearly show whether the May 9, 1978 back-dated "CORRECTED" Order is a forgery. There is no legitimate basis for the denial of such a request to have the Court's tape recording of a public hearing transcribed pursuant to the Court's own Rule 0.23, especially when such action will determine whether a fraud has been perpetrated upon the Supreme Court and the Petitioner by the Court of Appeals.

Several glaring errors in the Court of Appeals Per Curiam Opinion, pointed out to this Court in the Petition for a Writ of Certiorari in case Docket No. 79-178, but which nevertheless were apparently overlooked in the denial of the Petition, should make the granting of the Petition for a Writ of Mandamus a must. In its Per Curiam Opinion, the Court of Appeals said:

"On February 22, 1978, the orders of the bankruptcy judge relating

to appellant's claim were affirmed by Judge Brieant of the United States District Court for the Southern District of New York. On March 6, 1978, appellant moved for reargument, the motion being returnable before Judge Brieant on March 28, 1978. On March 23, 1978, appellant filed a notice of appeal to this Court from the order on which she was seeking reargument. Judge Brieant, who was unaware of the appeal, heard oral argument and reserved decision on the reargument motion. On learning of the appeal, Judge Brieant on April 17, 1978, vacated his determination to hear reargument and denied the motion without prejudice to such proceedings on appeal as the parties might deem appropriate. Appellant has appealed from that order."

However, as the Record of the proceedings in the District Court on March 28, 1978 clearly shows, which transcript formed part of the Record Upon Appeal, and as was repeatedly pointed out to the Court of Appeals in several of the motions referred to in the third footnote of its December 6, 1978 Opinion, nothing can be further from the truth. The pertinent part of the March 28, 1978 transcript belying the Court of Appeals statement, reads as follows:

MR. ZIRINSKY:
Mr. Shuffman has filed a notice of appeal. I suggest that we just get on with it.

THE COURT: Well, I will give it
another look.
(Underscoring provided)

This Court was also made aware of the clearly erroneous statement in the Per Curiam Opinion based upon the transcript of the proceedings held in the District Court on July 13, 1978, which transcript was reprinted in the Petition for a Writ of Certiorari in case Docket No. 79-178 at page A-47. The pertinent part of that transcript as it appears in the Appendix to the Petition, reads:

(Case Called.)

THE COURT: What is it today?

MR. SHUFFMAN: Your Honor, we are here on our third motion for hearing and rearguing this Court's affirmance of the orders of Bankruptcy Court Judge Babitt and to attempt to point out to this Court the errors in its earlier orders which would necessitate an order which we have prayed be entered indicating this Court's intention to grant the rehearing and reargument which it had determined to grant on March 28th.

In this Court's order dated June 9, 1978 docketed on June 12, 1978, this Court specifically said that knowledge of the pending appeal came to this Court after it had determined to grant reargument.

We have pointed out in our moving papers that on March 28, 1978 the Court was made aware that a notice of appeal had been filed, and right after the Court was informed that the notice of appeal had been filed it stated, 'I will take another look.'

Another glaring error, pointed out to both this Court and the Court of Appeals, concerns the fact that the bankruptcy Judge's sua sponte Amended Order provided post-confirmation commission payments to the Petitioner. In the Court of Appeals Per Curiam Opinion, however, the Court held:

"Equally unfounded is appellant's contention that the bankruptcy judge erred in denying priority status to her claim for commissions as an administration expense. The record established that appellant has received payment in full of all deliveries made by Rudd to Hartford during the period of arrangement. If appellant believes that she has not received commissions due her on deliveries made thereafter, her remedy lies not in the bankruptcy court nor on this appeal, but in a plenary action at law. See In re Gordon, 44 F. Supp. 581 (S.D.N.Y. 1942); 9 Collier on Bankruptcy ¶¶ 8.11, 8.12 (14th ed. 1975)."

In the Petition for a Writ of Certiorari in case Docket No. 79-178, Petitioner also pointed out the District Court's acknowledg-

ment of its erroneous belief that it did not approve Post-Confirmation commission payments. The pertinent part of the transcript, as quoted from the Petition, reads as follows:

The District Court, in an exchange with counsel, stated his prior misunderstanding thusly:

I really don't think that I took any jurisdiction over the debtor post-confirmation, and I think it misreads the memorandum decision to suggest that.

My understanding, and I think you conceded it on the record today, was that the bottom line of all these orders is that the estate will get the same treatment as any other unsecured creditor for goods actually sold prior to filing, and that the estate has been or will be paid for the goods purchased during the period that the debtor-in-possession was buying from Rudd.

MR. SHUFFMAN: During and after, your Honor.

On December 21, 1978, at a hearing in the District Court two weeks after the Per Curian Opinion, wherein Petitioner's counsel sought to have the Court sua sponte advise the Court of Appeals of the errors and fraud perpetrated upon the Petitioner, the Court admitted its awareness that the Bankruptcy Court's Amended Order provided for post-

Confirmation commission payments. The transcript reads as follows:

"MR. SHUFFMAN: Your Honor, under Smith v. Pollen adopted in this circuit by Ryan v. United States Lines, this court does have the duty to move in the Court of Appeals for a remand now that it knows its own affirmance was in error.

THE COURT: I don't know that. They tell me that it's not in error. I don't know that there is any action by this court that is in error.

MR. SHUFFMAN: Your Honor stated that you did not take jurisdiction for a period of post-confirmation, yet you ordered the appellant paid monies post-confirmation.

THE COURT: That is what the bankruptcy judge ordered. The bankruptcy judge ordered the money paid to you and I remonstrated with Mr. -- with the gentlemen who was here for the bankruptcy last time, Mr. Zirinsky, about why wasn't it paid when there was no stay, and I think he said he would pay it.

In the last six months, the Court of Appeals has found the time to issue fourteen en banc orders in Hartford related cases, most of them sua sponte. However, for over a year the Court has not ruled on the Motion for

Order Allowing Transcription of the Proceedings Held May 9, 1978. On October 29, 1979, the Court of Appeals is scheduled to hear oral argument on three more Hartford related Appeals, one of them on a sua sponte Order of the District Court enjoining Petitioner's counsel from filing any more papers in the District Court or Bankruptcy Court.

The sua sponte Order permanently enjoining Petitioner's counsel from instituting any proceedings which might uncover and expose the conspiracy to defraud Petitioner and this Court, entered without notice, without a hearing and without any request being made therefore, contains statements which the District Court Judge has acknowledged to be untruthful. The pertinent part of the Order reads as follows:

It appearing to the Court from a consideration and review of all prior papers and proceedings filed or had herein by David K. Shuffman as attorney for Rose Shuffman as Executrix of the Estate of Oscar Shuffman, deceased, that said David K. Shuffman has without justification engaged in a pattern of conduct involving continuous false and unfounded attacks on the character and integrity of lawyers, judges and officials of the United States Department of Justice, and that he has engaged also in the filing of repetitious motions which constitute harassment of other litigants, their attorneys and the Court, it is

The sua sponte permanent injunction, entered one year to the day of the May 9, 1978 hearing in the Court of Appeals on the Motion to Remand, came at the same time the District Court was considering a motion for its recusal based upon the numerous conflicting statements made during the course of the proceedings. In an Order entered the same day as the sua sponte injunction, the Court denied the motion for its recusal, and two other pending motions which the Court had said required argument and which would be set down for argument if it remained on the case.

That the Court was aware of the deliberate misstatements in its sua sponte Order enjoining Petitioner's counsel can readily be seen in the transcript of the hearing of the Motion to Reargue held on June 6, 1979. The pertinent part of the transcript reads as follows:

MR. SHUFFMAN: Your Honor, if I may read from your order.

THE COURT: You don't have to read it. It's part of the record.

MR. SHUFFMAN: Your Honor, then as part of the record this Court also knows that I have been appointed as agent by Bankruptcy Judge Roy Babitt to file criminal complaints with the United States Attorney against the attorneys at Weil, Gotshal & Manges and against their client for filing false bankruptcy petitions, false statements, and for otherwise engaging in numerous other acts in violation of --

THE COURT: That was a long time ago, wasn't it?

MR. SHUFFMAN: No, sir, it was not. It was on October 25, 1978.

THE COURT: That's a long time ago. Did you file anything?

MR. SHUFFMAN: Yes, sir, I did.

THE COURT: Why am I concerned with that?

MR. SHUFFMAN: Your Honor, because your order states that said David K. Shuffman has without justification engaged in a pattern of conduct involving continuous false and unfounded attacks on the character and integrity of lawyers, judges and officials of the United States Department of Justice.

When a bankruptcy judge states on the record that attorneys have lied, that a bankruptcy was a ripoff, this Court is required to take judicial notice of those statements by a bankruptcy judge.

THE COURT: I am not concerned with the proceedings before him.

If the Court of Appeals for the Second Circuit had nothing to hide, it would have allowed a transcription to be made of a tape recording containing its opinion and according to its Rule 0.23. Obviously if the tape backed up the "CORRECTED" Order as a true Order, there would be no hesitancy in performing an act which the Court is required by its own Rule to do and which act would put a severe dent in Petitioner's claim of a fix and cover up.

The errors in the Courts below have been repeatedly pointed out to this Court. Intelligent Judges would not have made such simple errors, or as many, as were made in the Courts below, unless they were deliberate. The very simple act of transcribing the tape recording of May 9, 1978 will show whether the "incomprehensible" "CORRECTED" Order was a false document and whether the Court of Appeals for the Second Circuit has perpetrated a fraud upon this Court and the Petitioner.

No valid reason exists for this Court not to want to determine the truth. Similarly, no valid reason exists for this Court to allow the Court of Appeals to violate its own Rule. Justice for all requires that this Court grant the relief requested in the Petition for a Writ of Mandamus.

Conclusion

Wherefore, Petitioner prays that a writ of mandamus issue out of this court directed to the Court of Appeals for the Second Circuit and the Judges thereof commanding them as such Judges, Clerk and Staff Attorney, to deliver to this Court the Court of Appeals tape recording of the argument held on May 9, 1978 in connection with the instant case, and to do and perform such other acts and things as may be necessary and proper in the premises.

Dated: October 22, 1979.

DAVID K. SHUFFMAN
Counsel for Petitioner
14 East 60th Street
New York, New York 10022
Telephone (212) 755-0006

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-eight.

In the Matter of
HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.
WELLINGTON PRINT WORKS, INC.

Debtors

ROSE SHUFFMAN, as Executrix of
the Estate of OSCAR SHUFFMAN,

Appellant

-against-

HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.,
WELLINGTON PRINT WORKS, INC.

Appellees.

It is hereby ordered that the motion made herein by counsel for the appellant

by notice of motion dated April 26, 1978 to remand this action to the United States District Court for the Southern District of New York

be and it hereby is denied

It is further ordered that the oral application to stay proceedings in this court and to extend the time to appeal from an order of Judge Brieant be and they hereby are denied.

A. DANIEL FUSARO,
Clerk

by: /s/ Edward Guardaro
Staff Attorney

* * *

HON. STERRY R. WATERMAN

HON. WALTER R. MANSFIELD

HON. JOE INGRAHAM

Circuit Judges

CORRECTED

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of May, one thousand nine hundred and seventy-eight.

In the Matter of
HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.
WELLINGTON PRINT WORKS, INC.

Debtors

ROSE SHUFFMAN, as Executrix of
the Estate of OSCAR SHUFFMAN,

Appellant

-against-

HARTFORD TEXTILE CORPORATION,
OXFORD CHEMICALS, INC.,
WELLINGTON PRINT WORKS, INC.

Appellees.

It is hereby ordered that the motion made herein by counsel for the appellant

by notice of motion dated April 26, 1978 to remand this action to the United States District Court for the Southern District of New York

be and it hereby is denied without prejudice to apply to Judge Brieant for whatever relief is appropriate.

It is further ordered that the oral application to stay proceedings in this court and to extend the time to appeal from an order of Judge Brieant be and they hereby are denied.

A. DANIEL FUSARO,
Clerk

by: /s/ Edward Guardaro
Staff Attorney

* * *

HON. STERRY R. WATERMAN

HON. WALTER R. MANSFIELD

HON. JOE INGRAHAM

Circuit Judges

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 13th day of September, one thousand nine hundred and seventy-eight.

Present:

Hon. Sterry R. Waterman
Hon. Walter R. Mansfield
Hon. Joe M. Ingraham
Circuit Judges

In the Matter of
HARTFORD TEXTILE CORP.,
OXFORD CHEMICALS, INC.,
WELLINGTON PRINT WORKS, INC.

Debtors.

ROSE SHUFFMAN, as Executrix of
the Estate of OSCAR SHUFFMAN,
Appellant,

78-5024

-v-

HARTFORD TEXTILE CORP.,
OXFORD CHEMICALS, INC.,
WELLINGTON PRINT WORKS, INC.,
Appellees.

Petitions dated May 16, 1978 and June 19, 1978 for reargument of appellant's motion for an ordering mandating jurisdiction back to the district court having been filed by counsel for the appellant.

Upon consideration thereof, it is

Ordered that said petitions be and they hereby are DENIED.

A. DANIEL FUSARO, Clerk

by: /s/ Sara Piovia, Esq.,
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re

HARTFORD TEXTILE CORPORATION
OXFORD CHEMICALS, INC., WELLINGTON
PRINT WORKS, INC.,

Debtors.

-x
:
:
: 73 B
: 674-676
:
: MEMORANDUM
: AND ORDER
-x

Brieant, J.

This Court entered a Memorandum decision and Order dated February 22, 1978 in effect affirming an order of Bankruptcy Judge Babitt, from which the Executrix of the Estate of Oscar Shuffman ("Shuffman") had appealed to the district court.

Thereafter, appellant moved for reargument in the district court. Such reargument was heard on March 28, 1978, and decision was reserved. Thereafter, Shuffman appealed to the Court of Appeals for the Second Circuit. On learning of the pendency of the appeal, this Court, by Memorandum and Order dated April 17, 1978, vacated, as improvidently granted, its determination to hear reargument, and denied the motion without prejudice to such proceedings on appeal as the parties might deem appropriate.

Then, by motion dated April 26, 1978, Shuffman moved in the Court of Appeals for an order to remand the matter to the district court. That motion was denied, by an Order docketed May 9, 1978, "without prejudice to apply to Judge Brieant for whatever relief is appropriate." The panel of the Court of Appeals

further ordered that "the oral application to stay proceedings in this Court and to extend the time to appeal from an order of Judge Brieant be and they hereby are denied."

Then Shuffman made another motion in the district court "to have a rehearing and reargument pursuant to the order of the Court of Appeals dated May 9, 1978." That motion, docketed May 19, 1978, came on for hearing before me on June 8, 1978.

All proceedings which took place in the district court were based upon the record of proceedings before Bankruptcy Judge Babitt, and such concessions and representations of uncontested fact made to this Court on the record by the counsel for the respective parties. No evidence was taken by this Court, and no findings of fact or determinations of credibility of witnesses occurred in this district court.

It now appears, the Court of Appeals having specifically denied appellant's oral application to stay proceedings in that Court, that a plenary appeal from the order of the district court of February 22, 1978 will soon be heard by a panel of the Court of Appeals. Indeed, a briefing schedule has already been adopted in that Court.

Under the circumstances, it is not clear what relief, if any, could be regarded as "appropriate," nor is it clear what was intended by that portion of the order of the Court of Appeals docketed May 9, 1978, which denied the motion to remand "without prejudice to apply to [the district court] for whatever relief is appropriate."

Cases cited by appellant as authority for further proceedings at this time in this Court do not stand for the propositions urged. Specifically, appellant relies upon Weiss v. Hunna, 312 F.2d 711 (2d Cir.), cert. denied 374 U.S. 853 (1963). We read that case to hold that once a litigant has filed a notice of appeal the district court is divested of jurisdiction to grant or deny relief under either Rule 59 or Rule 60(b), F.R.Civ.P., except with the express permission of the Court of Appeals. The order docketed in the Court of Appeals dated May 9, 1978 does not seem to grant such express authority to the district court.

There also seems to be no useful purpose which would be served by taking any further steps in the district court at this time. The Court of Appeals has before it all of the proceedings which took place before Bankruptcy Judge Babitt. Counsel for the debtor has asked this Court: "in the interests of justice and in the interests of judicial economy and in the interests of the parties, this matter is now in the Court of Appeals and let the Court of Appeals proceed with the disposition of the appeal." This requested procedure does appear appropriate.

The Clerk of the District Court is hereby directed to forward to the Court of Appeals to be associated with the matters docketed under the pending appeal the transcript of the proceedings before the district court on March 28, 1978 and on June 8, 1978.

In all other respects the relief requested by Shuffman's motion, docketed in this Court on May 19, 1978, is denied in the exercise of discretion as being unnecessary in view of the imminent hearing on the appeal to the Court

of Appeals, and is also denied for want of power. See, Weiss v. Hunna, supra

So Ordered.

Dated: New York, New York
June 9, 1978

/s/ CHARLES L. BRIEANT
Charles L. Brieant
U.S.D.J.